UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CLIFFORD PAUL WILTSIE, Appellant, vs. CALIFORNIA DEPARTMENT OF CORRECTIONS and WALTER DUNBAR, as Director of Corrections, LAWRENCE E. WILSON, as Warden California State Prison, San Quentin California, R. WHAM, as Associate Warden-Custody, California State Prison, San Quentin, California, C. B. McENDREE, as Correctional Captain, California State Prison, San Quentin, California, C. E. MOODY, as Correctional Lieutenant, California State Prison, San Quentin, California, DOES ONE and TWO, as Correctional Sergeants, California State Prison, San Quentin, California, N. T. SMITH and WOODSIDE, and DOES THREE through TWENTY-FIVE, Collectively and Individually, Appellees.	)	No. 22380

APPELLEES' PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING EN BANC

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TO THE HONORABLE RICHARD H. CHAMBERS, WALTER L. POPE and FREDERICK G. HAMLEY, CIRCUIT JUDGES:

Come now appellees Walter Dunbar, Lawrence E. Wilson, R. Wham, C. B. McEndree, C. E. Moody, N. T. Smith, K. J. Slee, M. R. Stauts, Woodside, R. L. Brown, T. Plant and R. O. Fehrenkamp, and pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure and Rule 12 of the Rules of the

United States Court of Appeals for the Ninth Circuit, respectfully request rehearing en banc of this Court's exceptionally important decision of December 31, 1968, in the above-entitled proceeding, which was a review of an order of the United States District Court for the Northern District of California dismissing a state prisoner's complaint filed in forma pauperis under the Civil Rights Act (Rev. Stat. §§ 1979 and 1980 [1875]; 42 U.S.C. §§ 1983 and 1985 [1964]).

As grounds for rehearing en banc, appellees respectfully represent:

I

THE PRISONER DID NOT STATE A CAUSE OF ACTION AGAINST APPELLEES, THE KEEPERS OF THE PRISON, BY ALLEGING THAT APPELLEES SMITH, SLEE, STAUTS, WOODSIDE, BROWN AND FEHRENKAMP STRUCK HIM DURING A GENERAL PRISON UPRISING.

Appellees, in January of 1967, were duly employed by the Department of Corrections of the State of California to operate and maintain the state penitentiary at San Quentin. By reason of this employment and its corresponding responsibility, appellees at all times exercised authority, control and discipline over the volatile prison population. Wiltsie, having lost his right to the free society of men, was appellees' prisoner and was subject to their authority, control and discipline.

As Wiltsie's complaint makes manifestly clear, the single alleged event of which he complains took place not during days of prison tedium and routine but during days of uprising and riot. Assuming the truth of his allegation,

during this period of turmoil Wiltsie was struck by certain named appellees while they were searching him for weapons or contraband. As described by the district court:

> "[T]his occurrence transpired at a time when prison tension was running high. It was shortly after a prison strike and certain racial incidents, which makes it clear that there was legitimate concern with the problems of maintaining control of the situation. These facts certainly justified the type of search involved herein, and further, the use of necessary force to maintain order and discipline."

Wiltsie did not allege in the district court any pattern of violence directed against him or even any injury to his person resulting from the alleged attack. He merely asserted that he was the victim of physical force. We submit that an allegation that force was used upon the prisoner during a general search of inmates necessitated by a prison riot, states no cause of action in a federal court under the Civil Rights Act. We further submit that the Court's decision establishing the sufficiency of Wiltsie's allegation is not in juxtaposition with other cases, or the intent of the Civil Rights Act.

In Screws v. United States, 325 U.S. 91, 108-109 (1945), the Supreme Court pointed out:

> "The fact that a prisoner is assaulted, injured, or even murdered by state officials does not necessarily mean that he is deprived of any right protected or

secured by the Constitution or laws of the United States."

In Cole v. Smith, 344 F.2d 721 (8th Cir. 1965), the state prisoner alleged that he had been assaulted by hospital aids in the prison hospital resulting in "scars, partial loss of hearing, and a disfigured ear." This was certainly a serious assault allegation. Nevertheless, the court affirmed the district court's dismissal of the civil rights action and applied the following rule, at page 724:

"[A]n assault by a law enforcement officer, in and of itself does not raise an action under the Civil Rights Act, and, specifically, that alleged assaults by state prison officials, without any showing of a constitutional violation, are matters for consideration of internal prison discipline of interest solely to the state and actionable, if at all, in the state courts."

Charges of aggression against state prison officials and guards, asserted as acts committed under color of state law, do not in and of themselves state claims upon which relief can be granted; and this rule has been applied by other courts. Negrich v. Hohn, 379 F.2d 213, 215 (3rd Cir. 1967); United States ex rel Atterbury v. Ragen, 237 F.2d 953, 954-955 (7th Cir. 1956); Cullum v. California Department of Corrections, 267 F. Supp. 524 (N.D. Cal. 1967); Siegel v. Ragen, 88 F. Supp. 996 (N.D. Ill. E.D. 1949), affirmed 180 F.2d 785 (7th Cir. 1950), cert. denied, 339 U.S. 990 (1950). In

the latter case the prisoner alleged "that he had been struck and beat over the head with a black-jack by an officer, resulting in infection of the middle ear and complete deafness in that ear. . . ." The court, in dismissing the claim, said it was "not prepared to establish itself as a 'co-administrator' of State prisons along with the duly appointed State officials."

Nothing in United States v. Price, 383 U.S. 787 (1966), Dodd v. Spokane County, Washington, 393 F.2d 330 (9th Cir. 1968), Brown v. Brown, 368 F.2d 992 (9th Cir. 1966), United States v. Jackson, 235 F.2d 925, 928-929 (8th Cir. 1956), United States v. Walker, 216 F.2d 683 (5th Cir. 1954) and Baldwin v. Morgan, 251 F.2d 780 (5th Cir. 1958), requires the result reached in the instant case. Price involved the alleged murder of three civil rights workers by Mississippi law enforcement officials; the sole issue was whether the conduct for which the defendants were indicted came within the scope of 18 U.S.C. §§ 241-245. In Dodd the dismissal of the civil rights complaint was reversed because this Court found defects in the procedure used by the district court and found that the complaint had been dismissed because the district court erroneously concluded that the Civil Rights Act was unavailable to a prisoner able to seek compensation in the state courts for the same alleged wrong. Dodd and Brown concerned beatings allegedly administered to force the prisoners to confess or testify falsely; these were attempts to interfere with the prisoners' constitutional rights by the continuous use and threat of force, not isolated incidents of force.

Jackson merely ruled on the sufficiency of an indictment under 18 U.S.C. § 242. The court found that the indictment which followed the form of the federal rules and the substance of the statute stated an offense against the United States. Walker is to the same effect. Baldwin was a class action by Negroes, not in custody, alleging a cause of action of discriminatory segregation in the Birmingham, Alabama, railroad terminal.

The above cases, relied on by this Court, are not relevant to any issue here and, thus, not controlling.

The instant case will have monumental impact not only upon the personal and professional lives of the appellees but upon the Department of Corrections and all of its employees. Any application of force, regardless of degree or purpose, by prison personnel will apparently subject the individuals involved and their supervisors to the threat of a lawsuit with the consequent possibility of monetary damages against them. The recent words of this Court in dismissing a suit against the members of the California Adult Authority are equally applicable to the employees of the Department of Corrections:

> "The monetary threat would, in all likelihood, exert a restricting influence on the overall functioning of the agency. And there would undoubtedly ensue an 'appalling inflammation of delicate state-federal relationships'. . . ." Silver v. Dickson, No. 22,129, United States Court of Appeals for the Ninth Circuit

(November 8, 1968).

Moreover, employees of the Department of Corrections cannot effectively perform their important work unless they are free from fear, reprisal and intimidation generated by inmates. Weller v. Dickson, 314 F.2d 598, 602 (9th Cir. 1963)(Duniway, J., concurring); Roberts v. Barbosa, 227 F. Supp. 20, 21 (S.D. Cal. 1964). The sustaining of the dismissal against the entity "California Department of Corrections," while proper, provides protection to the State which is more illusory than real. The instant case provides no safeguard against harrassing, fancied, imagined or misguided actions.

II

NO CAUSE OF ACTION, IN ANY FORM, WAS ALLEGED BY THE PRISONER AGAINST APPELLEES DUNBAR, WILSON, WHAM, McENDREE, MOODY AND PLANT.

Wiltsie's only allegation concerning appellee McEndree is that his voice announced over the prison public address system that there would be a general search of all cells for weapons and contraband. The sole allegation about appellee Moody is that he was named by McEndree and acted as the supervisor of the search. Appellee Plant is mentioned in Wiltsie's complaint only because he allegedly ordered appellees Smith, Slee, Stauts, Woodside and Brown to cease whatever they were purportedly doing to Wiltsie. Dunbar, Wilson and Wham are apparently being sued because they happened to be the administrators of the Department of Corrections at the time of the riot and the purported event. During a prison riot, or at any other time for that matter, it is hardly a violation of

prisoners' constitutional rights to take affirmative action to restore order, to direct and carry out a general search for weapons and contraband, or to order other personnel to cease doing something the prisoner himself alleges they should not be doing. Under the circumstances alleged by Wiltsie, these appellees at least should not be immersed in this $13,255,000.00 lawsuit.

III

THE MOTION TO DISMISS UNDER SECTION 1915 (d) WAS PROPERLY AND TIMELY MADE, AND THE COMPLAINT WAS PROPERLY AND TIMELY DISMISSED AS FRIVOLOUS AND MALICIOUS.

In footnote 1, this Court states that the "provision of section 1915(d) [28 U.S.C. § 1915(d)] for dismissal of a frivolous or malicious action actually contemplates sua sponte action by the district court before summons has issued, rather than action pursuant to a motion to dismiss" (Slip opinion, p. 4). This statement injects considerable confusion into the procedure for disposition of a civil rights action.

The preferable procedure has been to permit the filing of the complaint in forma pauperis in the first instance, and then, after summons has issued, to permit dismissal of a frivolous or malicious complaint upon motion of the defendants or sua sponte by the court. "The reason for this is, a complete record can thus be made in each case in an orderly fashion, both for the benefit of the District Court and this Court in the protection of any legal rights the petitioner may have." Cole v. Smith, supra, 344 F.2d 721, 723 (8th Cir.

1965); Oughton v. United States, 310 F.2d 803, 804 (10th Cir. 1962). This Court, moreover, has suggested that a district court exercise "great restraint" when dismissing a complaint sua sponte. Wright v. Rhay, 310 F.2d 687, 688 (9th Cir. 1962). See also Allison v. Wilson, 277 F. Supp. 271, 273 (N.D. Calif. 1967).

We submit that defendants, after issuance of summons, may bring to the court's attention the record which proves the frivolity or maliciousness of a complaint, by a motion to dismiss pursuant to section 1915(d).

CONCLUSION

For the foregoing reasons, we respectfully request a rehearing and suggest such rehearing en banc.

DATED: January 7, 1969

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